Supreme Court, U.S.
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92-1329

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CECIL A. PARTEE, in his individual capacity, LARRY WHARRIE and THOMAS DWYER,

Petitioners,

v.

ELTON HOUSTON and ROBERT BROWN,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the duty to disclose exculpatory evidence obtained after conviction is exclusively a prosecutorial function and whether prosecutors who fail to disclose such evidence must be entitled to absolute immunity so as not to discourage prosecutors from bringing exculpatory evidence to the attention of the court.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully request this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered on October 27, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals is published at 978 F.2d 362 (7th Cir. 1992). The District Court for the Northern District of Illinois, Eastern Division issued its written Memorandum Opinion and Order in this matter on March 11, 1991, which opinion is published at 758 F. Supp. 1228 (N.D. Ill. 1991). Both opinions are given as appendices to this petition.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered on October 27, 1992. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 (1988):

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In the evening hours of June 18, 1983, Ronnie Bell was murdered in a gang related, drive-by shooting on the south side of Chicago, Illinois. Respondents Elton Houston and Robert Brown were arrested and convicted of the murder. Petitioner Wharrie was the trial prosecutor assigned to respondent Houston's case. At his jury trial, respondent Houston contended that the eyewitnesses had mistaken him for his brother, J. L. Houston, a known El Rukn "hit man." *Houston v. Partee*, 978 F.2d 362, 363 (7th Cir. 1992). Although the first jury was deadlocked on Elton Houston's case, a second jury found him guilty of murder. He was sentenced to thirty-five years imprisonment on August 9, 1984.

Respondent Brown was tried in a bench trial, convicted of murder, and sentenced to a thirty-five year term on July 31, 1984. After his conviction, Brown unsuccessfully moved for a new trial based on newly discovered evidence and attached affidavits from "two informed sources" which stated that J. L. Houston, Earl Hawkins and a third unnamed El Rukn had killed Bell. 978 F.2d at 364. Respondents then appealed their convictions to the Illinois Appellate Court and the appeals were consolidated. One issue raised on appeal was the newly discovered evidence and the reliability of the affidavits attached to the Brown motion. See *People v. Houston*, 502 N.E.2d 1111 (Ill. App. 1986).

In May 1985, while the respondents' appeals were pending, Anthony Sumner and other known members of the El Rukn street gang, including J. L. Houston, Earl Hawkins and others, were arrested in a Cleveland, Ohio, safe house. *Houston*, 978 F.2d at 364. Sumner agreed to return to Chicago to discuss his involvement in the El Rukns with various local, state and federal law enforcement officials including petitioner Wharrie, then an assistant state's attorney. Among the numerous El Rukn crimes discussed by Sumner was the murder of Ronnie Bell. According to Sumner, El Rukns J. L. Houston, Earl Hawkins and Derrick Kees all took part in the Bell murder. Although the respondents allege that they requested the information, Petitioner Wharrie did not disclose Sumner's statements to the respondents at that time. After taking Sumner's statements, Petitioner Wharrie called him as a grand jury witness to testify about other El Rukn crimes. Eventually, Sumner testified at several state trials involving other defendants, with petitioner Wharrie acting as prosecutor.

In 1986, prior to petitioner Partee's appointment as State's Attorney, the Cook County State's Attorney's Of-

fice filed briefs in the respondents' appeals to the Illinois Appellate Court. In the briefs and at oral argument, the appellate prosecutors argued that the affidavits attached to Brown's post-trial motion were unreliable. On December 23, 1986, the Illinois Appellate Court affirmed respondents' convictions. *People v. Houston*, 502 N.E.2d 1111 (Ill. App. 1986). The respondents' petition for leave to appeal that decision to the Illinois Supreme Court was denied in May, 1987. *People v. Houston*, 511 N.E.2d 433 (Ill. 1987).

In February, 1989, Hawkins, who had become a cooperating witness, admitted to federal and state law enforcement personnel that he, J. L. Houston and Derrick Kees killed Bell. Later that year, J. L. Houston and Kees also confessed to the Bell murder. Houston, Kees, and Hawkins were all in prison at the time of these confessions. See, *People v. Fields and Hawkins*, 552 N.E.2d 791 (Ill. 1990).

In the spring of 1989, Petitioner Cecil Partee, was appointed to the position of State's Attorney. At that time, the State's Attorney's Office employed over 600 assistant state's attorneys. In July 1989, approximately three weeks after the confessions, petitioner Thomas Dwyer, then an assistant state's attorney, now an associate judge of the Circuit Court of Cook County, and then State's Attorney Partee disclosed these new confessions to the respondents at the respondents' request.

Respondents then filed post-conviction petitions in Illinois state court and were released from prison in October, 1989. Shortly thereafter, the respondents filed a §1983 violation individual capacity lawsuit against the petitioners, as well as various Chicago police officers, in the United States District Court for the Northern District of Illinois.

The district court dismissed the respondents' claims against petitioner Partee in his official capacity as State's Attorney of Cook County and against the County of Cook itself. *Houston v. Cook County*, 758 F. Supp. 1225 (N.D. Ill. 1990).

In their complaint, the respondents alleged that the petitioners Partee, Wharrie and Dwyer failed to disclose the statements of Sumner, Hawkins, Kees and J. L. Houston in violation of the United States Constitution and Illinois Supreme Court Rules governing criminal discovery and attorney conduct. The District Court dismissed the respondents' claim that police officers were liable for their failure to disclose the same exculpatory evidence, noting that "[n]o authority . . . imposes a duty upon a police officer or someone in the equivalent position, who has learned of exculpatory evidence affecting an already-convicted individual to search out that individual for disclosure purposes." *Houston v. Partee*, 776 F. Supp. 1309 (N.D. Ill. 1991).

The petitioners filed a motion to dismiss, claiming absolute prosecutorial immunity from civil suits. The district court denied the motion. *Houston v. Partee*, 758 F. Supp. 1288 (N.D. Ill. 1991). The petitioners appealed the district court's denial to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed the district court's denial and held that the petitioners were not entitled to absolute immunity because they acted in an investigative capacity when they obtained and later failed to disclose the El Rukns' statements. *Houston v. Partee*, 978 F.2d 362, 367 (7th Cir. 1992).

REASON FOR GRANTING THE WRIT

I.

THE DUTY TO DISCLOSE EXCULPATORY EVIDENCE OBTAINED AFTER CONVICTION IS EXCLUSIVELY A PROSECUTORIAL FUNCTION AND PROSECUTORS WHO FAIL TO DISCLOSE SUCH EVIDENCE MUST BE ENTITLED TO ABSOLUTE IMMUNITY SO AS NOT TO DISCOURAGE PROSECUTORS FROM BRINGING EXCULPATORY EVIDENCE TO THE ATTENTION OF THE COURT.

The Seventh Circuit Court of Appeals wrongly concluded in this case that petitioner-prosecutors were not entitled to absolute immunity from liability under §1983 because they acted "solely in an investigative capacity" when they failed to disclose exculpatory evidence obtained after respondents were convicted of murder, but while respondents' direct appeals were pending in the Illinois Appellate Court. The Seventh Circuit found, without employing the functional approach to prosecutorial immunity mandated by this Court in *Burns v. Reed*, ____ U.S. ___, 114 L. Ed. 2d 547, 111 S. Ct. 1933, 1939 (1991), that because petitioners' names did not appear on the appellate brief, they were not "personally" prosecuting respondents and hence were not entitled to absolute immunity.

Under the functional approach to prosecutorial immunity, prosecutors must be entitled to absolute immunity for the withholding of exculpatory evidence obtained after conviction. The decision of whether certain evidence is material and hence should be disclosed is exclusively a prosecutorial, not an investigative, function. This prosecutorial function requires the careful exercise of a prosecutor's judgment, is intimately associated with the judicial phase of the criminal process and continues throughout the judicial process, well after a conviction has been obtained. The Seventh Circuit Court of Appeals' erroneous decision

could hinder the judgment of prosecutors who obtain exculpatory evidence in a case where a conviction is obtained and an appeal is pending, but whose names do not appear on the appellate brief.

In addition, the Seventh Circuit's ruling is contrary to the ruling of this Court in *Imbler v. Pachtman*, 424 U.S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976), which also employed a "functional" approach to the question of absolute immunity and the ruling directly conflicts with one of the Seventh Circuit's own prior opinions as well as with the decisions of other courts which have considered this issue.

Under the functional approach immunity employed by this Court in *Burns v. Reed*, ____ U.S. ____, 114 L. Ed. 2d 547, 111 S. Ct. 1934 (1991) and *Imbler v. Pachtman*, 424 U.S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984, 989 (1976), the distinction between the actions of a prosecutor in his investigative capacity and those in his prosecutorial capacity is crucial. This Court has held that "prosecutors are absolutely immune from liability under §1983 for their conduct in initiating a prosecution and in presenting the State's case, insofar as that conduct is ultimately associated with the judicial phase of the criminal process." *Burns* 111 S.Ct. at 1939, citing *Imbler*, 96 S.Ct. at 995.

In *Imbler v. Pachtman*, this Court specifically ruled that absolute immunity was applicable to the deliberate withholding of exculpatory information by a prosecutor. 96 S.Ct. at 995, n. 34. The court reasoned that as a matter of principle as well as of practical application, there was "no less an infringement of a defendant's rights by the knowing use of perjured testimony than by the deliberate withholding of exculpatory information." *Id.* Such activities were "intimately associated with the judicial phase

of the criminal process" and thus were "functions to which the reasons for absolute immunity apply with full force." 96 S.Ct. at 995.

In a separate footnote, the *Imbler* Court further observed "[t]he possibility of personal liability . . . could dampen the prosecutor's exercise of his duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation." 96 S.Ct. at 993, n. 25. Citing to the same professional ethical standards respondents allege were violated by petitioners in the instant case, this Court noted, "after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." *Id.*

Thus, this Court in *Imbler* clearly contemplated that absolute immunity apply to the conduct of the prosecutors at issue here, namely, the withholding of exculpatory evidence after conviction.

The Seventh Circuit Court of Appeals' labelling the instant prosecutors' failure to disclose exculpatory evidence obtained following conviction as investigatory conduct and ruling that the prosecutors were thus not entitled to absolute immunity from liability is not only in opposition to *Imbler*, but also conflicts with one of its own prior rulings, *Briscoe v. LaHue*, 663 F.2d 713 (7th Cir. 1981), *aff'd*, 460 U.S. 325 (1983).

In *Briscoe*, the Seventh Circuit Court of Appeals considered allegations that prosecutors, including the named State's Attorney of Cook County, withheld material evidence from appellate tribunals in the context of a §1983 suit for civil damages. The court held that "[s]ince the misconduct alleged here is 'intimately associated with the

judicial phase of the criminal process' [citation to *Imbler*], it cannot form the subject of a civil rights claim for damages against these prosecutors." 663 F.2d at 721-722. The Seventh Circuit Court of Appeals' ruling in this case is in direct conflict with this holding. Though cited by petitioners in their Brief on appeal, the Seventh Circuit Court of Appeals made no attempt to distinguish *Briscoe* from the instant case and did not even cite the case in its opinion. This Court by contrast, cited with approval to *Briscoe* in *Burns v. Reed*, *supra*, 111 S. Ct. at 1939.

Other courts which have considered the issue of the applicability of absolute immunity to a prosecutor's withholding of exculpatory evidence following conviction have also concluded that absolute immunity extends to such conduct. See, e.g. *Hauptmann v. Wilentz*, 570 F. Supp. 351 (D.N.J. 1983), *aff'd*, 770 F.2d 1070 (3d Cir. 1985), *cert. denied* 474 U.S. 1103, where the court ruled that the former New Jersey Attorney General was entitled to absolute immunity against claims that he suppressed exculpatory evidence at trial, continued to suppress this evidence after the trial was concluded, and still withheld the disclosure of exculpatory evidence after he left his office; and *Henzel v. Gerstein*, 608 F. 2d 654, 657 (5th Cir. 1979), where the Fifth Circuit Court of Appeals noted that "[f]ear of civil liability could hinder a prosecutor's judgment in conducting a case at the appellate level as well as at the trial level."

In its opinion, the Seventh Circuit Court of Appeals confuses the activity of the prosecutor at the time he received the information with the duty he must perform in disclosing it. An examination of the source and nature of that duty demonstrates that the rule was developed exclusively for prosecutors, and does not even apply to investigators. Further, the exercise of this duty is purely a prosecutorial

function, since the decision whether to disclose evidence is one "intimately associated with the judicial phase of the criminal process." *Imbler, supra,* 996 at 995.

In *Brady v. Maryland,* 373 U.S. 83, 10 L.Ed. 2d 215, 83 S. Ct. 1194, 1196-1197 (1963), this Court first set forth the rule that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." As noted by this Court in *Imbler v. Pachtman, supra,* and by respondents in their complaint to the district court, various ethical rules directed specifically toward prosecutors impose an ongoing duty upon them to disclose exculpatory evidence to criminal defendants even following conviction. *Imbler,* 96 S. Ct. at 993, n. 25; Illinois Rules of Professional Responsibility 1989, Rule 7-103(b). By their terms, these rules apply exclusively to prosecutors and not to investigators.

The decision whether certain evidence is material and hence should be disclosed is one that requires careful exercise of a prosecutor's judgment. See, *United States v. Agurs,* 427 U.S. 104, 49 L. Ed. 2d 342, 96 S. Ct. 2392, 2399 (1979). The decision made by the prosecutor helps "shape a trial", *Brady,* 53 S. Ct. at 1194, and also the course of appellate and post-conviction proceedings. *House v. Belford,* 956 F. 2d 711, 721 (7th Cir. 1992); *Briscoe v. LaHue,* 663 F. 2d 713, 721 (7th Cir. 1981). Such decisions must be regarded as a prosecutorial function since they are "intimately associated with the judicial phase of the criminal process." Accordingly, this function should be protected by absolute immunity to ensure that the prosecutor exercises his best judgment in these crucial evidentiary decisions.

A comparison of the prosecutors' activity at issue here with conduct by prosecutors previously determined to be investigative in *Burns v. Reed*, *supra* and *Mitchell v. Forsyth*, 472 U.S. 511, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985), underscores the conclusion that the petitioners were not acting in an investigative capacity when they withheld exculpatory evidence from respondents obtained after conviction, but rather were proceeding in their role as advocates for the State. In *Mitchell*, this Court found that the Attorney General "was not acting in a prosecutorial capacity" when he authorized a warrantless wiretap that was arguably related to a potential prosecution, and hence was not entitled to absolute immunity from liability. 105 S. Ct. at 2812. In *Burns*, this Court held that absolute immunity does not extend to the giving of legal advice to police in the investigative phase of a case. 111 S. Ct. at 1944. The court noted that "it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to police, but to allow police officers only qualified immunity for following the advice." *Id.*

No such incongruity would be created by allowing absolute immunity to the prosecutors' action in the instant case since police officers have no corresponding duty to disclose evidence to criminal defendants. Indeed, in this same case the District Court has ruled that "no authority . . . imposes a duty on a police officer or someone in the equivalent position, who has learned of exculpatory evidence affecting an already-convicted individual to search out that individual for disclosure purposes." *Houston v. Partee*, 776 F. Supp. 1309, 1311 (N.D. Ill. 1991).

Instead of following the functional approach to prosecutorial immunity set forth by this Court in *Imbler* and *Burns* and examining the nature of the prosecutor's conduct in this case, the Seventh Circuit arbitrarily deter-

mined that a prosecutor's role in prosecuting a case ends at conviction unless that prosecutor is "personally" prosecuting the appeal of that conviction. Under the Seventh Circuit's narrow view, after conviction of a criminal defendant, prosecutorial immunity can only apply to prosecutors whose names appear on an appellate brief.[1] *Houston v. Partee*, 978 F. 2d at 366-367.

This ruling is inconsistent with the criminal appeals process which commonly encompasses not only one direct but also additional post-conviction proceedings in state and federal court and includes the possibility of further proceedings before the original trial court. More importantly, this ruling is inconsistent with the obligation of all prosecutors involved in a case, whether at the trial level, or as a supervisor, or as the named State's Attorney in whose name hundreds of prosecutors act, to "always be faithful to [the] overriding interest that justice shall be done." *United States v. Agurs*, *supra*, 96 S. Ct. 2401. The prosecutor is "the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 79 L. Ed. 1314, 55 S. Ct. 629, 633 (1976). Thus, it is the prosecutorial function of every prosecutor, whether or not his name appears on an appellate brief, to disclose exculpatory evidence in his possession to criminal defendants. Such evidence can then form the basis of a post-conviction petition which may eventually secure the release of an innocent man. *Houston v. Partee*, 978 F. 2d at 368. These functions are clearly

[1] Petitioners maintain that any prosecutor who has a duty to disclose evidence is entitled to full immunity under the functional approach regardless of whether or not their names appear on any document filed in connection with the judicial phase of the criminal process, including an appellate brief.

"*intimately* associated with the judicial phase of the criminal process" and are thus entitled to the protection of absolute immunity, so the public may be assured that prosecutors are using their best judgment in these matters, unfettered by fear of personal liability.

The Seventh Circuit's ruling in this case is particularly harsh to Petitioner Partee, the former State's Attorney of Cook County, who assumed office in the Spring of 1989. Had he been in office at the time the State's brief was filed in the Illinois Appellate Court, his name would have appeared on that brief and under the Seventh Circuit's analysis, he would therefore have been entitled to absolute immunity for his subsequent delay in disclosing the confessions. The absurdity of this result exposes the failure of the Seventh Circuit to properly employ the "functional approach" to immunity set forth in *Burns* or *Imbler*.

Therefore, certiorari should be granted to resolve the conflicts between the Seventh Circuit's opinion in this case and established law, and to prevent an adverse effect on the functioning of the criminal justice system.

CONCLUSION

For the above stated reason, this Court should grant this petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 91-1624

ELTON HOUSTON and ROBERT BROWN,

Plaintiffs-Appellees,

v.

CECIL A. PARTEE, Cook County State's Attorney, THOMAS DWYER and LARRY WHARRIE,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 3342—**Milton I. Shadur,** *Judge.*

ARGUED FEBRUARY 21, 1992—DECIDED OCTOBER 27, 1992

Before POSNER and MANION, *Circuit Judges,* and VAN SICKLE, *Senior District Judge.**

MANION, *Circuit Judge.* In 1984, Elton Houston and Robert Brown were convicted of murdering Ronnie Bell and sentenced to thirty-five years in prison. In May 1985, while Houston's and Brown's appeals were pending, Anthony Sumner, a member of the notorious El Rukn gang, told law enforcement officials that Houston and Brown

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* The Honorable Bruce M. Van Sickle, Senior District Judge for the District of North Dakota, is sitting by designation.

had not murdered Bell. Sumner identified the murderers as El Rukns J.L. Houston (Elton Houston's brother), Earl Hawkins and Derrick Kees. In February 1989, J.L. Houston, Hawkins and Kees confessed to murdering Bell. None of this information was disclosed to Houston or Brown until, after finding out about the confessions on their own, their attorneys confronted the defendant prosecutors. With the information in hand, Houston and Brown filed post-conviction petitions in Illinois state court and were released from prison in October 1989.

Shortly thereafter, Houston and Brown filed this section 1983, individual-capacity lawsuit against Cecil A. Partee, the former Cook County State's Attorney, former Assistant State's Attorneys Thomas Dwyer and Larry Wharrie, and various Chicago police officers. The defendant prosecutors filed a motion to dismiss claiming absolute immunity from suit. The district court denied the motion, *Houston v. Partee*, 758 F. Supp. 1228 (N.D.Ill. 1991), and the prosecutors appeal. This appeal is within our jurisdiction on the authority of *Nixon v. Fitzgerald*, 457 U.S. 731, 741-43 (1982) (denial of the substantial claim of absolute immunity is immediately appealable under 28 U.S.C. § 1291), and we affirm with instructions.

I.[1]

In the evening hours of June 18, 1983, Ronnie Bell was murdered in a gang-related, drive-by shooting. Elton Houston and Robert Brown were arrested for and convicted of the Bell murder. Houston's first jury trial resulted in a mistrial, but, in August 1984, the jury in his second trial returned a guilty verdict; Brown was convicted in a bench trial in April 1984. Their convictions were based, in large

[1] At this point in the proceedings, we state the following facts as they appear in the complaint, which we must accept as true. Further details about the murder and the trials of Houston and Brown can be found in *People v. Houston*, 502 N.E.2d 1111 (Ill. App. Ct. 1986).

part, on questionable identifications by three bystanders. During his two trials, Houston presented several witnesses who testified that Houston was with them at the time of the murder. In addition, throughout his trials, Houston maintained that he was being mistaken by the identifying witnesses for his brother J.L. Houston. It was undisputed that J.L. owned the car involved in the shooting; and J.L's weightlifting belt, J.L.'s fingerprints, and the murder weapons were found in the car. According to the complaint, J.L. Houston was known to the police as an El Rukn hit man, and Elton Houston was not an El Rukn.

After he was convicted, and before Houston's second trial, Brown filed a motion for a new trial based on newly discovered evidence. He attached affidavits from "two informed sources" stating that J.L. Houston, Earl Hawkins and a third unnamed El Rukn had killed Ronnie Bell.[2] The motion was denied. Houston and Brown appealed their convictions to the Illinois Appellate Court, and the appeals were consolidated. One issue raised on appeal was the newly discovered evidence and the reliability of the affidavits.

In May 1985, while the plaintiffs' appeals were pending, a high-ranking member of the El Rukns, Anthony Sumner, was arrested and became a cooperating witness in the long-term investigation of the El Rukn gang by the Cook County State's Attorney and the United States Attorney for the Northern District of Illinois. He was interviewed by Chicago police officers, Assistant United States Attorneys and Assistant State's Attorneys—including defendant Larry Wharrie. Among the numerous crimes that Sumner disclosed to the law enforcement officials, he de-

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[2] Although not included in the allegations in the complaint, further details about these two affidavits are outlined in *Houston*, 502 N.E.2d at 1119. According to that court, the affidavit of Evelyn Mapp stated that Earl Hawkins confessed to Mapp that he and two other men had killed Bell; the affidavit of Darrell Cannon stated that J.L. Houston admitted to Cannon that he had participated in the shooting with two others.

scribed the Bell killing in great detail. He stated that Bell was shot in retaliation for a prior shooting of an El Rukn and that three El Rukns were involved, one driving and two shooting. Sumner said that the shooting took place near a viaduct on 88th Street in Chicago and that J.L. Houston's car was used. These details matched the facts as they were known to the police and the statements given by the witnesses at the plaintiffs' trials. Sumner specifically identified the driver of the car as J.L. Houston and identified the actual shooters as Earl Hawkins and Derrick Kees.

Wharrie—although he had prosecuted Houston and Brown, and although he knew that Sumner's statement corroborated both Houston's testimony at trial and the affidavits submitted by Brown, the reliability of which was at issue in the pending appeals—did not disclose Sumner's statements to Houston, Brown or their attorneys. Rather, when Brown and Houston, through their attorneys, repeatedly requested any information that Sumner had provided about the Bell murder, Wharrie falsely told them that Sumner had provided no evidence favorable to Houston or Brown. In addition, although Wharrie called Sumner as a grand jury witness on numerous occasions, asking him about dozens of other El Rukn crimes (including six to ten other murders), he never inquired about the Bell murder.

In 1986, the Cook County State's Attorney's Office filed appellate briefs in the plaintiffs' appeals. In the briefs, the prosecutors represented to the Illinois Appellate Court that the newly discovered evidence presented in Brown's post-trial motion was not reliable. Later, at oral argument on the appeals, the prosecutors again told the Illinois Appellate Court that the affidavits submitted by Brown were uncorroborated and, therefore, unreliable. On December 23, 1986, the Illinois Appellate Court affirmed Houston's and Brown's convictions; among other things, the Illinois Appellate Court agreed with the trial court's finding that neither affidavit was credible enough to require a new trial. *People v. Houston*, 502 N.E.2d 1111, 1120 (Ill. App. Ct. 1986). The Illinois Supreme Court denied Houston's

and Brown's petition for leave to appeal in May 1987. *People v. Houston*, 511 N.E.2d 433 (Ill. 1987) (table).

Despite repeated further requests for information from plaintiffs' counsel, the stonewalling continued during 1987 and 1988. Then, in February 1989, Hawkins (who had been cooperating with law enforcement officials and providing credible information and testimony since 1987) confessed to federal and state law enforcement officials that the Bell killing had indeed been committed by him along with J.L. Houston and Kees. He also stated that Houston and Brown did not participate in the shooting. Soon after Hawkins' confession, J.L. Houston and Kees (both then in prison) likewise admitted their own guilt and gave detailed accounts of the Bell killing.

The complaint alleges that defendants Cecil A. Partee and Thomas Dwyer knew about Sumner's statement and the three confessions. Nonetheless, amazingly, they did not disclose any of this information to Houston, Brown or their attorneys. It was only three weeks after the confessions, when plaintiffs' attorneys confronted them with information obtained from other sources, that Partee and Dwyer admitted they had confessions from J.L. Houston, Hawkins and Kees. Even then, Partee and Dwyer failed to reveal Sumner's statement; they did not tell Houston or Brown about Sumner's statement until July 1989, after the plaintiffs developed information from other sources. In the meantime, Houston and Brown had served four years in prison for a crime that they did not commit.

II.

The defendant prosecutors, Cecil A. Partee, Thomas Dwyer and Larry Wharrie, argue that this action must be dismissed because they are absolutely immune from suit. Not all official actions of a state prosecutor are absolutely immune from section 1983 liability. Rather, prosecutors are absolutely immune from liability for damages under 42 U.S.C. § 1983 only "for their conduct in 'initiating a prosecution and in presenting the State's case,'

insofar as that conduct is 'intimately associated with the judicial phase of the criminal process.' " *Burns v. Reed*, 111 S.Ct. 1934, 1939 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976)). Accordingly, prosecutors have been granted absolute immunity for their conduct in probable cause hearings, *see Burns*, 111 S.Ct. at 1940-42, for their conduct before grand juries, *see Lucien v. Preiner*, 967 F.2d 1166, 1167 (7th Cir.), *cert. denied*, 61 U.S.L.W. 3263 (U.S. Oct. 5, 1992) (No. 92-5374), and for the knowing use of false testimony and the deliberate suppression of exculpatory evidence at trial, *Imbler*, 424 U.S. at 431 & n. 34. A state prosecutor performing investigative or administrative functions, in contrast, may only assert a qualified immunity. *Burns*, 111 S.Ct. at 1943-44; *Auriemma v. Montgomery*, 860 F.2d 273, 277-78 (7th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989). Thus, prosecutors have only qualified immunity for authorizing a warrantless wiretap in the interest of national security, *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985), and for giving legal advice to police officers, *Burns*, 111 S.Ct. at 1942-45.

In this case, the defendant prosecutors failed to disclose exculpatory evidence discovered after Houston and Brown were convicted but while their direct appeals were pending in the Illinois Appellate Court. We must decide on which side of the absolute/qualified immunity line such an act falls. "Absolute immunity from civil liability for damages is of a 'rare and exceptional character.' " *Auriemma*, 860 F.2d at 275 (citation omitted). "The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns*, 111 S.Ct. at 1939. Thus, "the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Id.*

The prosecutors argue that they are absolutely immune from suit because the plaintiffs' appeals were still pending before the Illinois Appellate Court. Defending the appeals, the prosecutors argue, was part of the prosecution of Houston and Brown thus entitling the prosecutors to

absolute immunity. The prosecutors rely on the substantial case law granting absolute immunity for acts done in various post-conviction proceedings. *See, e.g., Lucien*, 967 F.2d at 1167-68 (executive clemency proceedings); *Johnson v. Kegans*, 870 F.2d 992, 997 (5th Cir.), *cert. denied*, 492 U.S. 921 (1989) (parole proceedings); *Joseph v. Patterson*, 795 F.2d 549, 557 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987) (direct appeal); *Henzel v. Gerstein*, 608 F.2d 654, 657 (5th Cir. 1979) (direct appeal); *Bruce v. Wade*, 537 F.2d 850, 852 (5th Cir. 1976) (habeas corpus proceedings).

We do not dispute these cases. But there is a critical distinction between such cases and this case: The defendant prosecutors in this case were not involved in the post-conviction proceedings; that is, they were not personally prosecuting the appeal.[3] At oral argument, the defendant prosecutors argued that this distinction does not matter because absolute immunity, somehow, "attached" during the prosecution of Houston and Brown in the Illinois trial court and, once attached, continues indefinitely. But this position cannot be correct. In the first place, it contradicts the prosecutors' argument that the pending appeals gave them absolute immunity. If absolute immunity "attaches" at trial and then continues indefinitely, it would hardly matter that the appeal in this case was still pending when the prosecutors discovered that others may have murdered Bell. Under the prosecutors' reasoning, they would already be absolutely immunized before and after all appeals were concluded. Also, apparently only

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[3] The complaint alleges that defendants Wharrie and Dwyer filed a brief and presented oral argument in the Illinois Appellate Court. The Illinois Appellate Court decision, however, does not list Wharrie or Dwyer as attorneys for the State. *Houston*, 502 N.E.2d at 1113. (Partee assumed office after the appeals.) Also, at oral argument before this court, the parties agreed that none of the defendant prosecutors were involved in that appeal. "Wharrie and Dwyer did not file the state's brief or argue the appeal." Fn.4, Appellants' brief.

defendant Wharrie prosecuted Houston and Brown in the trial court. Thus, this "attachment" theory would only shield him. The prosecutors surely cannot argue that absolute immunity indefinitely attaches to every Cook County State's Attorney once a prosecution begins.

More fundamentally, this "attachment" argument distorts the nature of absolute prosecutorial immunity. Absolute immunity is not a systemic immunity like that afforded states under the Eleventh Amendment; it does not protect government entities. Neither does it rest on an individual's status as a prosecutor. Rather, the Supreme Court has taken a "functional approach" to immunity, *Burns*, 111 S.Ct. at 1939; a prosecutor's entitlement to absolute immunity is grounded in "the nature of the functions he was performing in this case." *Mitchell*, 472 U.S. at 521. We do not decide whether a *prosecutor* is entitled to absolute immunity; we decide whether a prosecutor *performing a particular function* is entitled to absolute immunity. *Juriss v. McGowan*, 957 F.2d 345, 348 (7th Cir. 1992) ("Absolute immunity is granted with an eye to the function performed by the sued official, not to the status or identity of that official."); *Auriemma*, 860 F.2d at 277 ("Absolute immunity is designed to protect the functions that particular government officials perform, not the government officials themselves.").

When the defendant prosecutors discovered the evidence exculpating Houston and Brown, they were not functioning as prosecutors. Wharrie had already succeeded in obtaining the convictions of Houston and Brown, and the prosecution of Houston's and Brown's appeal had been passed on to others in the State's Attorney's office. The prosecutors' knowledge of and failure to disclose Sumner's original statements and the three subsequent confessions thus had no connection to their "role as advocate for the State." *Burns*, 111 S.Ct. at 1942; *see also Allen v. Lowder*, 875 F.2d 82, 86 (4th Cir. 1989) (district attorney "cannot seriously argue that his actions resulted from any advocacy role in rehabilitating [the plaintiff's] conviction" be-

cause he "did not himself participate in the presentation of the state's appeal").

Rather, the defendant prosecutors are in the same position as the defendant Chicago police officers: state law enforcement officials who, during a large scale investigation of the El Rukn gang, discovered—and then suppressed—evidence which could have exculpated Houston and Brown. Federal courts, including this one, have been willing to grant prosecutors absolute immunity for gathering information and evidence in furtherance of a decision to initiate a prosecution. *See, e.g., Joseph*, 795 F.2d at 555. But since Houston and Brown had already been convicted, the continuing investigation in the El Rukns case was hardly a precursor to a prosecution of Houston and Brown. And there is no other basis for distinguishing the prosecutors' acts from those of the police. The prosecutors are thus not entitled to any more immunity than the defendant police officers. The defendant prosecutors were acting solely in an investigative capacity; accordingly, they are only entitled to assert a qualified immunity.

Our conclusion that the defendant prosecutors are not absolutely immune from liability is confirmed by application of the factors that have been found particularly important in determining whether absolute immunity bars a suit: "(1) whether an historical or common law basis exists for granting an official absolute immunity from suit for performing a particular function; (2) whether performing the function poses special risks of vexatious litigation; and (3) whether sufficient safeguards exist to prevent abuses of power." *Auriemma*, 860 F.2d at 275; *see also Burns*, 111 S.Ct. at 1941-44; *Mitchell*, 472 U.S. at 521-22; *Lucien*, 967 F.2d at 1167.

First of all, the defendant prosecutors have failed to identify (and we have not found) any historical or common-law support for extending absolute immunity to prosecutors who fail to disclose exculpatory evidence acquired when they are no longer personally prosecuting the criminal case. Prosecutors were absolutely immune from dam-

age liability at common law for the decision to initiate a prosecution, *see Imbler*, 424 U.S. at 421-22; and for making or eliciting false or defamatory statements in any hearing before a tribunal which performed a judicial function, *see Burns*, 111 S.Ct. at 1941. In *Imbler*, 424 U.S. at 431 n. 34, the Supreme Court refused to distinguish between use of perjured testimony and the deliberate withholding of exculpatory evidence. But, unlike this case, *Imbler* (and the other cases we have reviewed) involved a prosecutor's preparation for or participation in some type of judicial proceeding. At most, the absolute immunity granted prosecutors at common law extended only to acts in preparation for or during a judicial proceeding.

The next factor—risk of vexatious litigation—also does not support granting absolute immunity in this case. In *Burns*, 111 S.Ct. at 1943, the Supreme Court clarified that our concern with vexatious litigation "is not merely a generalized concern with interference with an official's duties, but rather is a concern with interference with the conduct closely related to the judicial process." "Absolute immunity," the Court stated, "is designed to free the *judicial process* from the harassment and intimidation associated with litigation." *Id.* The risk of vexatious litigation, therefore, "justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct." *Id.* Here, as when he gives legal advice to police officers, a prosecutor is less likely to become entangled in litigation than when he is initiating and prosecuting a case. A defendant is less likely to be aware that a prosecutor, no longer involved in the prosecution, is withholding exculpatory evidence. More importantly, denying absolute immunity to a prosecutor who, after his role in the prosecution is finished, withholds exculpatory evidence, cannot interfere with that prosecutor's conduct in judicial proceedings. Any litigation arising from such prosecutorial abuses, then, is not the type of litigation that we are concerned about here.

Finally, there are few safeguards to prevent the abuses of power alleged in this case. Generally, the judicial process itself is a sufficient check to prevent prosecutorial abuses from going unredressed. The judicial process is self-correcting. Procedural rules and the ability to confront the prosecutor at trial, appeals, and the possibility of collateral relief obviate the need for damages actions to control unconstitutional conduct and prevent unjust results. *Burns*, 111 S.Ct. at 1942; *Mitchell*, 472 U.S. at 522-23. In this case, however, the judicial process was largely unavailable as a check against the abuses that occurred. No court could restrain the out-of-court activities of the defendant prosecutors when they were no longer involved in the case. Since the alleged prosecutorial abuses took place after conviction, the safeguards normally available at trial could not control the defendant prosecutors' alleged unconstitutional conduct. Because the defendant prosecutors made no appearance in the Illinois Appellate Court and withheld the exculpatory evidence from that court, that system provided no opportunity to prevent an unjust result. Houston and Brown did ultimately obtain some relief in state post-judgment proceedings—that is, they were finally released from prison. Nevertheless, Houston and Brown spent four years in prison for a crime they did not commit. Without this damage action, they will probably never have an opportunity to be compensated for those lost years.[4]

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[4] We have suggested another method for discerning the dividing line between absolute and qualified immunity: "whether the injury depends on the judicial decision. If there would be no loss but for the judge's acts, then the prosecutor or witness who induces the judge to act has absolute immunity." *Millspaugh v. County Dep't of Public Welfare*, 937 F.2d 1172, 1175 (7th Cir.), *cert. denied*, 112 S.Ct. 638 (1991). Previously, this test has only been applied to pre-conviction prosecutorial abuses, *cf. Lucien v. Preiner*, 967 F.2d 1166 (7th Cir.), *cert. denied*, 61 U.S.L.W. 3263 (U.S. Oct. 5, 1992) (No. 92-5374), and applying it to the facts in this case is somewhat awkward. We believe, however, that it also

(Footnote continued on following page)

There is a presumption against granting government officials absolute immunity. "Public officials seeking absolute immunity from civil liability bear the burden of showing that overriding considerations of public policy require that they be exempt from personal liability for their alleged unlawful conduct." *Auriemma*, 860 F.2d at 275. The defendant prosecutors have not convinced us that absolute immunity for their suppression of Sumner's statement and the three confessions is necessary for the continued efficient functioning of our criminal justice system. Making prosecutors answer for their post-prosecution acts that were not related to the prosecution will not hamper them in initiating a prosecution or in presenting the state's case. *See Imbler*, 424 U.S. at 424-28. In the absence of precedent requiring us to do so, we decline to extend absolute prosecutorial immunity from claims by people whom the prosecutors are no longer prosecuting.

III.

The defendant prosecutors Cecil A. Partee, Thomas Dwyer and Larry Wharrie are not entitled to absolute immunity. We thus AFFIRM the district court's order denying the defendant prosecutors' motion to dismiss and REMAND for further proceedings.

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[4] *continued*

supports our holding. The defendant prosecutors discovered and then suppressed the exculpatory evidence after Houston and Brown had been convicted. Although, at the time of Sumner's statement, the case was still pending in the Illinois Appellate Court, Houston's and Brown's injury did not depend on that court's decision. Rather, there was an actionable harm without the mediation of a judge. Every day that the prosecutors failed to disclose the exculpatory evidence was a day that Houston and Brown were wrongly imprisoned. This injury does not flow from (and the plaintiffs are not seeking damages for) Wharrie's prosecution of the wrong men or the conduct of the prosecution on appeal. Rather, Houston and Brown seek damages for the defendant prosecutors' failure to correct Wharrie's mistake once they discovered evidence that Houston and Brown may not be guilty.

The prosecutors are, however, on remand, entitled to assert qualified immunity from suit. Regardless of whether the plaintiffs eventually prevail in this section 1983 action, their allegations—if proven—may constitute a violation of Rule 3.8(b) of the Illinois Rules of Professional Conduct: "A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if the defendant is not represented by a lawyer, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused or mitigate the degree of the offense." Since for purposes of this opinion we are assuming the plaintiffs' assertions are true, it is premature to conclude that the defendants' actions were as reprehensible as alleged. Nevertheless, the defendants are officers of the court, and as such, their alleged suppression of the exculpatory evidence and deliberate falsehoods about the existence of such evidence raises very serious questions.

We are well aware of our responsibility under Canon 3(B)(3) of the Code of Judicial Conduct for United States Judges: "A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." It appears to this court that if the alleged behavior of the defendant prosecutors is true, it would merit investigation by the appropriate disciplinary body of the Illinois Attorney Registration and Disciplinary Commission. Accordingly, we DIRECT THE CLERK OF COURT to send a copy of this opinion to the Illinois Attorney Registration and Disciplinary Commission to monitor further developments of this case on remand and to take any appropriate disciplinary measures it deems necessary.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: October 27, 1992

BEFORE:

Honorable RICHARD A. POSNER, Circuit Judge
Honorable DANIEL A. MANION, Circuit Judge
Honorable BRUCE M. VAN SICKLE, Senior District Judge*

No. 91-1624

ELTON HOUSTON and ROBERT BROWN,

Plaintiffs-Appellees

v.

CECIL A. PARTEE, Cook County State's Attorney,
THOMAS DWYER and LARRY WHARRIE,

Defendants-Appellants

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 90 C 3342 – Milton I. Shadur, Judge

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, with costs, and the case is REMANDED for further proceedings, in accordance with the decision of this court entered this date.

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* The Honorable Bruce M. Van Sickle, Senior District Judge for the District of North Dakota, is sitting by designation.

App. 15

[758 F.Supp. 1228 (N.D. Ill. 1991)]

Elton HOUSTON and Robert Brown, Plaintiffs,

v.

Cecil PARTEE, et al., Defendants.

No. 90 C 3342.

United States District Court, N.D. Illinois, E.D.

March 7, 1991.

Confirming Ruling Announced Orally March 5, 1991.

Former county state's attorney and assistant state's attorneys sought dismissal of civil rights action brought by criminal defendants. The District Court, Shadur, J., held that attorneys were not absolutely immune from § 1983 liability for their alleged suppression of exonerating evidence first discovered postconviction but then willfully withheld from both defense counsel and postconviction courts.

Motion denied.

Civil Rights — 214(9)

Former county state's attorney and assistant state's attorneys were not absolutely immune from § 1983 liability for their alleged suppression of exonerating evidence first discovered postconviction but then willfully withheld from both defense counsel and postconviction courts. 42 U.S.C.A. § 1983.

Thomas Peters, Rick Halprin and Susan Shatz, Chicago, Ill., for plaintiffs.

Jack O'Malley, State's Atty., and Harold E. McKee, III, Asst. State's Atty., Cook County, for defendants.

MEMORANDUM OPINION AND ORDER

SHADUR, District Judge.

Former Cook County State's Attorney Cecil Partee and Assistant State's Attorneys Thomas Dwyer and Larry Wharrie have filed a motion to dismiss the Third Amended Complaint brought against them under 42 U.S.C. § 1983 ("Section 1983") by Elton Houston ("Houston") and Robert Brown ("Brown").[1] Defendants ground their motion on absolute immunity principles, because each of them is sued individually for actions (or inaction) during the period that they were serving as prosecutors. For the reasons stated in this memorandum opinion and order, Defendants' motion is denied.

Nature of Plaintiffs' Claim

Plaintiffs' Complaint portrays a scenario somewhat different from the more familiar contention that a conviction obtained with the aid of evidence that was known to the prosecutor to be tainted, so that the prosecutor

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[1] After the motion under consideration here was brought, plaintiffs filed (without objection) a Fourth Amended Complaint adding four City of Chicago police officers as defendants. Because no substantive change has been made by that new pleading in the allegations against the present movants, for simplicity this opinion will refer to the most recent version rather than to the Third Amended Complaint as the "Complaint" and will refer to the movants collectively as "Defendants."

is sought to be mulcted in damages for that misconduct (the type of situation dealt with in the seminal absolute immunity decision in *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1967) and in our Court of Appeals' recent explication of *Imbler* in *Buckley v. Fitzsimmons*, 919 F.2d 1230 (7th Cir. 1990)). Instead what is charged here is that *after* Houston and Brown were convicted, sentenced and imprisoned—all of which occurred without any alleged impropriety on the part of the prosecutors—Defendants learned of exculpatory evidence that exonerated plaintiffs but failed to disclose that evidence, thus causing plaintiffs to languish in prison for several years.

According to the Complaint (which must of course be taken as true for current purposes), both plaintiffs were convicted of an El Rukn gang-related 1983 shooting murder of Ronnie Bell ("Bell"), based in principal part on questionable identifications by two bystanders. Houston's first jury trial resulted in a mistrial, then Brown's separate bench trial resulted in a conviction and finally Houston's second jury trial led to his conviction too.

In May 1985 a high-ranking member of the El Rukns, Anthony Sumner ("Sumner"), was arrested and became a cooperating witness in the long-term investigation of that organization and its leaders by the offices of the Cook County State's Attorney and the United States Attorney for the Northern District of Illinois. Among the numerous crimes that Sumner disclosed to Assistant State's Attorneys and Chicago police in great detail was the Bell killing, which he described as having been a retaliatory assassination for the prior shooting of an El Rukn. All the details that Sumner gave matched the facts as they were known to the police (and as had been described by

the witnesses at Defendants' trials). Most critically, Sumner specifically identified the driver of the car as J.L. Houston (Houston's brother)—something that Houston had claimed all along—and identified the actual killers as two El Rukns, Earl Hawkins and Derrick Kees ("Kees"), and *not* Brown.[2]

Nevertheless neither the Assistant State's Attorneys nor the police officers disclosed the information about Sumner's statements to Houston or Brown or their lawyers.[3] In the face of requests from those lawyers for any information that Sumner had provided about the Bell murder, the Assistant State's Attorneys falsely said that Sumner had provided no evidence favorable to plaintiffs. Indeed, as part of the same coverup the Assistant State's Attorneys used Sumner as a grand jury witness on numerous occasions, asking him about dozens of other El Rukn crimes (including six to ten other murders) but *never* inquiring about the Bell killing. That deliberate suppression of the truth also included its being withheld from the

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[2] By a kind of bizarre coincidence, this opinion has been dictated and transcribed even while the jury is deliberating its verdict in a criminal trial conducted before this Court—one involving the potential imposition of a death penalty—in which one critical government witness was Kees, who acknowledged that during the several years surrounding and including 1983 he had in fact been a "General" in, and a professional killer for, the El Rukns (which had a paramilitary organizational structure). In dealing with one of the motions in that trial, this Court was required to read Kees' grand jury testimony in another case, in which Kees did indeed specifically admit the Bell killing among others and identified J.L. Houston (not the plaintiff in this case) and Earl Hawkins as the others involved in the Bell murder.

[3] Partee did not become State's Attorney until some years later, in the spring of 1989. Plaintiffs charge him with the concealment of their known innocence for the few months between the time he took office and the date of plaintiffs' release from prison.

United States Attorney's Office in its own contemporaneous El Rukn investigation.

But the Assistant State's Attorneys did not stop with that coverup as to Houston and Brown and their lawyers only. Even worse in terms of the lawyers' professional obligations, during the course of plaintiffs' 1986 appeals from their convictions the Assistant State's Attorneys falsely represented *to the Illinois Appellate Courts* that there was nothing to Brown's post-trial claim of newly-discovered exculpatory evidence, even though they knew that his claim was fully corroborated (and more) by the Sumner statements.

That stonewalling continued during 1987 and 1988 despite further requests for information from plaintiffs' counsel. Then in February 1989 Hawkins (who had been a cooperating informant-witness since 1987, providing credible information and testimony as to a number of crimes) actually confessed that the Bell killing had indeed been committed by him along with J.L. Houston and Kees—and *not* by plaintiffs. Both J.L. Houston and Kees (each of whom was in prison) then admitted their own guilt and gave detailed accounts of the killing.

Even then Defendants said nothing, continuing to suppress the Sumner statement and the three confessions. It was only after plaintiffs' counsel had obtained some information from other sources and had confronted the Assistant State's Attorneys with it that Defendants came clean. In the meantime, Houston and Brown had served four years in prison for the crime that they did not commit and as to which Defendants had known of their innocence soon after their convictions.

Absolute Immunity

Imbler teaches that the social gains that are promoted by the need for fearless and uninhibited prosecutorial action outweigh the protection of constitutional rights under Section 1983, so that even active prosecutor misconduct in obtaining a conviction—even such a thing as suborning perjury—is insulated from suit. And *Buckley*, 919 F.2d at 1241-42 (citation omitted), quoted in part at Defendants' Mem. [8],[4] locates the watershed for separating unprotected conduct by a prosecutor from conduct covered by the mantle of absolute immunity:

> All of this suggests a simple demarcation. If the injury flows from the initiation or prosecution of the case, then the prosecutor is immune and the defendant must look to the court in which the case pends to protect his interests. If, however, a constitutional wrong is complete before the case begins, then the prosecutor should be treated as a police detective would be in like circumstances: qualified rather than absolute immunity. Prosecutors who break open doors or torture suspects into confessing cause injuries that are complete outside of court, and which the judge cannot diminish (but may be able to compensate). Prosecutors whose out-of-court acts cause injury only to the extent a case proceeds will be brought to heel adequately by the court.

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[4] In one of life's petty annoyances, Defendants' counsel has thoughtlessly failed to number the pages of his memorandum, so that this Court has had to do so. That seems to be a growing fashion, encountered by this Court in perhaps a half-dozen filings within the past several months. Is it that such lawyers don't anticipate being quoted or cited—or perhaps that they subconsciously don't *want* to be called to account for what they have said? In any event, the memorandum pages are indicated by brackets.

Defendants seek to wrap themselves in that protective mantle. They do not acknowledge—most likely they do not even recognize—the irony of what their Mem. [5-6] quotes from *Imbler*, 424 U.S. at 427, 96 S.Ct. at 993 (citation omitted):

> The ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to § 1983 liability. Various post-trial procedures are available to determine whether an accused has received a fair trial. These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment.

And that same irony is underscored by the language quoted from *Buckley* in the preceding paragraph.

Under the express language (as well as the underlying policy) reflected in those and other statements from *Imbler* or *Buckley*, there is nothing to support immunity in the situation presented here. Holding a prosecutor responsible for such active suppression of exculpatory (or even worse, fully exonerating) evidence *after* a defendant has been convicted poses no threat whatever to the values identified in those cases—to what *Imbler*, 409 U.S. at 427 n. 25, 96 S.Ct. at 993 n. 25 (the footnote to the language quoted earlier in this opinion) spoke of in these terms:

> The possibility of personal liability also could dampen the prosecutor's exercise of his duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation.

> At trial this duty is enforced by the requirements of due process, but after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction. Cf. ABA Code of Professional Responsibility § EC 7-13 (1969); ABA, Standards, *supra*, § 3.11.

Indeed, quite the contrary is true: That express *Imbler-Buckley* reliance on the *courts* to protect the rights of the unjustly convicted defendant is directly subverted by the prosecutor who knowingly and actively withholds subsequently-learned material evidence that would enable the courts to right the wrong of the unjust conviction—and as alleged in this case, by the prosecutor who actively misrepresents those later-learned facts to the courts. Defendants would turn *Imbler* on its head by invoking their ethical obligations, as described in the language quoted in the preceding paragraph, to insulate themselves against liability for a deliberate violation of those very obligations.

Conclusion

Accordingly this Court holds that Defendants are not absolutely immune from Section 1983 liability for their suppression of exonerating evidence that they first learn of post-conviction but that they then wilfully withhold from both defense counsel and the post-conviction courts. Defendants' motion is denied, and they are ordered to answer the Complaint on or before March 19, 1991.
